

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001

RULE ON MOTIONS CONCERNING  
MAIL PREPARATION CHANGES

Docket No. RM2016-6

**MOTION OF THE UNITED STATES POSTAL SERVICE  
TO SUSPEND PROCEEDINGS**

(April 11, 2017)

The United States Postal Service hereby moves the Commission to suspend proceedings in this docket pending resolution of the petition for review of Order Nos. 3047 and 3441, which is pending in the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”).<sup>1</sup> At issue in that review proceeding is whether the Commission’s substantive standard for determining when a mail-preparation requirement becomes a “rate” change (subject to 39 U.S.C. § 3622(d)(1)) is consistent with requirements of the Administrative Procedure Act and with the D.C. Circuit’s previous decision concerning the permissible scope of the price cap.<sup>2</sup> Because Order No. 3827<sup>3</sup> now makes it clear that the proceedings in this docket have become inextricably interwoven with that substantive standard, the Postal Service requests that the Commission suspend proceedings in this docket until the dispute over the substantive standard is resolved by the D.C. Circuit.

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<sup>1</sup> *United States Postal Serv. v. PRC*, No. 16-1284 (D.C. Cir. filed Aug. 11, 2016).

<sup>2</sup> *U.S. Postal Serv. v. PRC*, 785 F.3d 740 (D.C. Cir. 2015).

<sup>3</sup> Order No. 3827, Revised Notice of Proposed Rulemaking, PRC Docket No. RM2016-6 (Mar. 27, 2017).

## DISCUSSION

On January 22, 2016, the Commission issued Order No. 3047, setting forth the substantive standard it plans to use to determine when changes in mail-preparation requirements are subject to the price cap and therefore require compliance with the Commission's rules, including 39 C.F.R. § 3010.23(d)(2).<sup>4</sup> On the same day, the Commission initiated this parallel rulemaking, proposing to establish procedures under which interested parties may initiate proceedings to demonstrate that a mail-preparation change implicates the price cap under that standard.<sup>5</sup>

As originally conceived, this rulemaking proceeding was procedural in nature and operated independently of the substantive standard that the Commission adopted in Order No. 3047 (a standard that is currently under review by the D.C. Circuit). In particular, the Commission stated that the purposes underlying the rulemaking proceeding were to "clarify and streamline" the process by which interested parties may claim that a mail preparation change requires compliance with the Commission's price cap rules,<sup>6</sup> and to protect the Postal Service from the specter of "after-the-fact price cap determinations by establishing a procedure to resolve those questions prior to implementation of the mail preparation requirement."<sup>7</sup> To advance those purposes, the Commission proposed 39 C.F.R. § 3001.21(d), which would, among other things,

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<sup>4</sup> Order No. 3047, Order Resolving Issues on Remand, PRC Docket No. R2013-10R (Jan. 22, 2016).

<sup>5</sup> Order No. 3048, Notice of Proposed Rulemaking on Motions Concerning Mail Preparation Changes, PRC Docket No. RM2016-6 (Jan. 22, 2016).

<sup>6</sup> Order No. 3048 at 3; *accord* Order No. 3441, Order Resolving Motion for Reconsideration of Commission Order No. 3047, PRC Docket No. R2013-10R, at 11 (July 20, 2016).

<sup>7</sup> Order No. 3441 at 20; *Id.* at 21 (rule "was intended to address the Postal Service's concerns of unpredictability of how mail preparation changes would be handled" and to "protect[] the Postal Service from future impromptu and unpredictable challenges to its handling of mail preparation requirements with regard to the price cap").

establish a 30-day filing deadline for claims that a mail-preparation change required compliance with the price cap.<sup>8</sup> The Postal Service agreed with the underpinnings of that proposed rule, noting that it was critical to resolve in advance whether a mail-preparation change would be subject to the price cap in light of the potentially staggering impact of such a determination on the Postal Service's pricing flexibility, and proposed some additional enhancements to ensure that those purposes would be more effectively realized.<sup>9</sup>

In Order No. 3827, issued on March 27, 2017, the Commission announced that its original proposal – 39 C.F.R. § 3001.21(d) – was being withdrawn and that it was being replaced with 39 C.F.R. § 3010.23(d)(5).<sup>10</sup> Unlike its predecessor, 39 C.F.R. § 3010.23(d)(5) does not enumerate specific processes for mailers to challenge a mail-preparation standard, nor does it provide any of the procedural mechanisms meant to protect the Postal Service from the specter of after-the-fact price cap determinations. Instead, the newly proposed rule simply requires: 1) that the Postal Service post proposed changes to mail-preparation rules in a single location;<sup>11</sup> and 2) that the Postal Service affirmatively designate whether proposed mail-preparation rule changes meet the substantive standard enumerated in Order No. 3047, thus requiring compliance with the price cap and 39 C.F.R. § 3010.23(d)(2).<sup>12</sup> This new proposal shifts the burden of proof to the Postal Service, which would be responsible for applying the standard from

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<sup>8</sup> Order No. 3048 at 7.

<sup>9</sup> United States Postal Service Comments on Proposed Rules for Motions Concerning Mail Preparation Changes, PRC Docket No. RM2016-6 (Sept. 2, 2016).

<sup>10</sup> Order No. 3827, at 1-2.

<sup>11</sup> *Id.* at 13-14.

<sup>12</sup> *Id.*

Order No. 3047 to each mail-preparation rule change and determining whether it must comply with the price cap.

In short, rather than establish a set of procedures that interested parties can comment on independent of the D.C. Circuit's pending review of the standard in Order No. 3047, the new proposal simply requires the Postal Service to determine whether the standard is satisfied upfront. As a result, the parties' ability to comment on 39 C.F.R. § 3010.23(d)(5) is entirely dependent on the outcome of the pending review by the D.C. Circuit. Indeed, one of the central issues before the court is whether the standard in Order No. 3047 is too vague to provide the Postal Service with meaningful guidance, let alone for it to hope to satisfy a burden of proof. The court's resolution of the parties' substantive dispute will therefore inform the parties' understanding of the need for (and content of) procedural rules that would most effectively bring about resolution of challenges to mail-preparation rule changes. Accordingly, the Postal Service urges the Commission to defer proceedings in this rulemaking until the D.C. Circuit resolves the pending dispute over the validity of the substantive standard from Order No. 3047.<sup>13</sup>

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<sup>13</sup> The Postal Service notes that the Commission previously held this rulemaking in abeyance under similar circumstances. See Order No. 3096 – Order Holding Rulemaking in Abeyance, PRC Docket No. MC2016-6 (Feb. 23, 2016). In that instance, the Commission suspended these proceedings until it issued an order resolving the Postal Service's motion for reconsideration of Order No. 3047. *Id.* Just like the Postal Service's pending petition of review before the D.C. Circuit, the Postal Service's motion for reconsideration sought review of the substantive standard enumerated in Order No. 3047. See Motion for Reconsideration of Order No. 3047, PRC Docket No. R2013-10R (Feb. 22, 2016).

Respectfully submitted,

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